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Pretermitting Hearings on Asylum-Type Claims

The concept of pretermitting hearings on asylum-type cases is based upon the principle of avoiding unnecessary testimony and presentation of evidence. Asylum-type hearings arise under either section 208 or section 243(h) of the Immigration and Nationality Act,[1] that is in a claim for asylum or a request for withholding of deportation to a particular foreign country. In order to obtain asylum in the United States an alien must demonstrate a well-founded fear of persecution if he or she returns to a country from which he or she fled.[2] For a grant of withholding of deportation to a particular country, an alien must show a clear probability of persecution if he or she returns to that country.[3] A provision in the Immigration and Nationality Act of 1952, section 243(h)(2), added in 1980,[4] bars withholding of deportation if the alien falls within any of four listed categories:

(A) the alien ordered, incited, assisted or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

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1. 8 U.S.C. § 1158 (1982); 8 U.S.C. § 1253(h) (1982), *as amended*. Asylum and withholding of deportation are forms of relief available in either exclusion or deportation proceedings. *See* Immigration and Nationality Act, § 208(a), 8 U.S.C. § 1158(a) (1982); 8 C.F.R. § § 208.3(b), 208.9, 208.10(a) (1988).

2. *See* Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421 (1987). It should be noted that a finding of "firm resettlement" in a third country constitutes a bar to a grant of asylum. 8 C.F.R. § 208.14 (1988); Rosenberg v. Woo, 402 U.S. 49 (1971).

3. *See* Immigration & Naturalization Serv. v. Stevic, 467 U.S. 407 (1984). Prior to the *Cardoza-Fonseca* decision, *supra*, the Board of Immigration Appeals had held that there was no real difference between the standards of "clear probability of persecution" and "well-founded fear of persecution," but since the United States Supreme Court enunciation that there is a variation the Board has recognized this in *In re* Mogharrabi, I. & N. Dec., Int. Dec. No. 3028 (B.I.A. 1987).

4. 8 U.S.C. § 1253(h)(2) (1982).

(B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;
(C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or
(D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

Of the above categories, the one most frequently encountered in litigation is also the most concrete, (B), and next to it, (C). If it is determined that the alien was convicted of a particularly serious crime in the United States or if one of the other three categories is proved, then the alien is barred prima facie from the relief of withholding of deportation. An issue that has frequently arisen is what constituted a "particularly serious crime."[5] The statute is silent on this, but case law now provides some guidance. Conviction for a "particularly serious crime,"[6] or for a "serious nonpolitical crime outside the United States,"[7] is not coextensive with mere conviction for a crime involving moral turpitude, the general standard used for excludability or deportability in the Immigration and Nationality Act.[8] Crimes against the person, such as murder, robbery and burglary, as opposed to crimes against property, are more likely to be considered "particularly serious crimes" under section 243(h)(2)(B) of the Immigration and Nationality Act and also "serious nonpolitical crimes" under section 243(h)(2)(C) of the same Act.[9] Less guidance is provided, either by cases or statutes, regarding whether narcotics convictions are "par-

5. *Id.* § 1253(h)(2)(B).
6. *Id.*
7. *Id.* § 1253(h)(2)(C).
8. *In re* Frentescu, 18 I. & N. Dec. 244 (B.I.A. 1985); *see* Immigration and Nationality Act, *as amended*, § § 212(a)(9), 241(a)(4), 8 U.S.C. § § 1181(a)(9), 1251(a)(4) (1982); cf. *In re* S, 8 I. & N. Dec. 344 (B.I.A. 1959) (conviction for carrying a concealed and deadly weapon with intent to use against the person of another as a conviction for a crime involving moral turpitude). A threshold defense to Section 243(h)(2)(C), raised from time to time, is predictably that the crime was political in nature. *See* McMullen v. Immigration & Naturalization Serv., 788 F.2d 591 (9th Cir. 1986); O'Rourke v. Immigration & Naturalization Serv., 742 F.2d 1438 (2d Cir. 1984) (decision without published opinion), *cert. denied*, 467 U.S. 1256; *In re* McMullen, 17 I. & N. Dec. 542 (B.I.A. 1980); *In re* McMullen, I. & N. Dec., Int. Dec. No. 2967 (B.I.A. 1984); *see also* Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986), *cert. denied*, 479 U.S. 882; *In re* Doherty by Gov't of U.K., 599 F. Supp. 270 (S.D.N.Y. 1984).
9. *In re* Rodriguez-Coto, I. & N. Dec., Interim Dec. No. 2985 (B.I.A. 1985) (armed robbery); *In re* Garcia-Garrocho, I. & N. Dec., Interim Dec. No. 3022 (B.I.A. 1986) (burglary in the first degree); *In re* Carballe, I. & N. Dec., Interim Dec. No. 3007 (B.I.A. 1986) (armed robbery); *In re* McMullen, I. & N. Dec., Interim Dec. No. 2967 (murder abroad); *In re* Ballester-Garcia, 17 I. & N. Dec. 592 (B.I.A. 1980) (larceny abroad); *In re* Rodriguez-Palma, 17 I. & N. Dec. 465 (B.I.A. 1980) (robbery abroad); *see In re* Frentescu, 18 I. & N. Dec. at 244.

ticularly serious crimes." Trafficking in cocaine, heroin, pentazocine, and large amounts of marijuana, however, appears to fall within this category.[10] Marijuana has been considered somewhat differently from other substances in immigration law. A waiver of deportability is available in certain instances of an offense of possession of thirty grams or less of marijuana. In addition, convictions for illicit possession or traffic in marijuana have recently been eliminated, by name only, as a basis for exclusion and deportation, and are now, instead, grouped as one of the interdicted enumerated controlled substances.[11] Conspiracy to possess, with intent to distribute, in excess of 4,000 pounds of marijuana, however, was determined to be a "particularly serious crime" in *Arauz v. Rivkind*.[12] Trafficking in methaqualone, described as a controlled substance but not a narcotic drug or marijuana, was determined not to be a "particularly serious offense."[13]

Separate findings are not needed on conviction for a "particularly serious crime" and whether an alien so convicted "constitutes a danger to the community of the United States."[14] A conviction for a "particularly serious crime" automatically renders an alien "a danger to the community of the United States." Nor is a balancing test required to determine whether the gravity of an offense is outweighed by the potential danger to the alien in being returned to the country in which he avers he fears prosecution.[15]

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10. Shahandeh-Pey v. Immigration & Naturalization Serv., 831 F.2d 1384 (7th Cir. 1987) (heroin and pentazocine); Ramirez-Ramos v. Immigration & Naturalization Serv., 814 F.2d 1394 (9th Cir. 1987) (heroin); Mahini v. Immigration & Naturalization Serv., 779 F.2d 1419 (9th Cir. 1986) (heroin); Arauz v. Rivkind, 834 F.2d 979 (11th Cir. 1987) (4000 lbs. of marijuana); *In re* Gonzalez, I. & N. Dec., Interim Dec. No. 3071 (B.I.A. 1988) (heroin); *see also* Castro-O'Ryan v. Immigration & Naturalization Serv., 821 F.2d 1415 (9th Cir. 1987).

11. *See* Immigration & Nationality Act, *as amended*, § § 212(a)(23), 212(h), 241(a)(11), 241(f)(2), 8 U.S.C. § § 1182(a)(23), 1182(h), 1251(a)(11), 1251(f)(2) (1982 & Supp. 1986); *see also* Controlled Substances Act, § § 102, 21 U.S.C. § 802, *amended by* Anti-Drug Abuse Act, Sub-tit. M § 1751, Pub. L. No. 99-570, 100 Stat. 3207 (1986). As far back as 1977 an Operations Instruction—O.I. 242.1(a)(28)—of the Immigration and Naturalization Service provided that normally deportability proceedings should not be commenced against a lawful permanent resident of the United States for one minor marijuana offense, not exceeding one hundred grams.

12. *See supra* note 7.

13. *In re* Morejon-Gutierrez, B.I.A. File No. A 23180324-Atlanta, Apr. 4, 1986 (unpublished opinion). It may be noted that this decision predated the enactment of the Anti-Drug Abuse Act of 1986, *supra* note 8, which removed illicit possession of, or trafficking in, marijuana by name as a basis for excludability or deportability and instead listed marijuana as an enumerated controlled substance. *See* 21 C.F.R. § 1308.11, Schedule I(d) (1988).

14. *Ramirez-Ramos*, 814 F.2d at 1384; Crespo-Gomez v. Richard, 780 F.2d 932 (11th Cir. 1986); *In re* Carballe, I. & N. Dec., Interim Dec. No. 3007; *see also In re* Garcia-Garrocho, I. & N. Dec., Interim Dec. No. 3022.

15. *Ramirez-Ramos*, 814 F.2d at 1384; Garcia-Mir v. Smith, 766 F.2d 1478 (11th Cir. 1985), *cert. denied*, 475 U.S. 1022 (1986); *In re* Rodriguez-Coto, I. & N. Dec., Interim Dec. No. 2985.

The circumstances of the crime and the nature of the conviction, however, may be related by the alien in doubtful, that is, nonheinous, situations to assist in a determination of whether a crime was or was not "particularly serious" and the alien a likely "danger to the community."[16] In this instance, testimony regarding the crime is not for the apparent purpose of relitigation of the criminal proceeding which would not be permissible in deportation proceedings.[17]

Even if an offense is found to be a "particularly serious crime" or, for that matter, a "serious nonpolitical crime," section 243(h)(2)(B) or (C) will not constitute a bar to withholding of deportation if the alien secured a prior judicial recommendation against deportation under section 241(b) of the Immigration and Nationality Act.[18] A recommendation against deportation, however, applies only to convictions for crimes involving moral turpitude other than those narcotics convictions that would be deportable offenses.[19] In addition, the recommendation must have been obtained in a timely manner from the sentencing judge.[20]

Not on the same plane as the defense of a prior judicial recommendation against deportation is a defense of the failure of a trial judge, or of the alien's attorney, at a criminal proceeding to advise the alien of the consequences of a guilty plea upon deportability. The better law is that this defense must usually fail.[21]

Pretermitting hearings on asylum-type cases does not extend to an immigration judge's preventing an alien from submitting a request for asylum and withholding of deportation.[22] The better law, it seems, is that pretermitting hearings does not extend either to dispensing with a request for an advisory opinion from the Department of State of the United States.

16. *In re* Frentescu, 18 I. & N. Dec. at 244; *see also In re* Ballester-Garcia, 17 I. & N. Dec. at 592; *see also In re* Carballe, I. & N. Dec., Interim Dec. No. 3007.

17. *See* Estrada-Rosales v. Immigration & Naturalization Serv., 645 F.2d 819, 821 n.3 (9th Cir. 1981); Chiaramonte v. Immigration & Naturalization Serv., 626 F.2d 1093, 1098 (2d Cir. 1980); Ocon-Perez v. Immigration & Naturalization Serv., 550 F.2d 1153, 1154 (9th Cir. 1977); Aquilera-Enriquez v. Immigration & Naturalization Serv., 516 F.2d 565, 570 (6th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); Brice v. Pickett, 515 F.2d 153, 154 (9th Cir. 1975); Wing v. United States, 46 F.2d 755, 756 (7th Cir. 1931).

18. 8 U.S.C. § 1251(b) (1982), *as amended; see, e.g.*, Giambanco v. Immigration & Naturalization Serv., 531 F.2d 141 (3d Cir. 1976); *In re* Gonzalez, 16 I. & N. Dec. 134 (B.I.A. 1977).

19. 8 U.S.C. § 1251(b)(2) (1982), *as amended.*

20. *Id.*

21. *See* United States v. Santelises, 476 F.2d 787 (2d Cir. 1973); United States v. Sambro, 454 F.2d 918 (D.C. Cir. 1971); United States *ex rel.* Durante v. Holton, 228 F.2d 827, 830 (7th Cir.), *cert. denied*, 351 U.S. 963 (1956); United States v. Parrino, 212 F.2d 919 (2d Cir.), *cert. denied*, 348 U.S. 840 (1954); Joseph v. Esperdy, 267 F. Supp. 492 (S.D.N.Y. 1966).

22. *See* Montes v. Meese, No. CV 86-4081 (C.D. Cal. Dec. 4, 1987).

Although a Board of Immigration Appeals decision, *In re Carballe*,[23] indicates that this request may be omitted, a prior Board decision,[24] as well as current regulations[25] and recent case law,[26] suggest the opposite conclusion. Logic, too, compels that conclusion, as only a hearing on withholding of deportation and not a hearing on asylum may be pertermitted. Section 243(h)(2) of the Immigration and Nationality Act places a potential bar to relief under section 243(h) of the Act, that is to withholding of deportation, but not to asylum, under section 208 of the Act, which relief may be granted as a matter of discretion or by statute.[27] *In re Carballe* suggests the ability to pretermit hearings on asylum, citing the decision of *Immigration & Naturalization Service v. Bagamasbad*,[28] a case involving adjustment of status to that of a lawful permanent resident under section 245 of the Immigration and Nationality Act,[29] to support the proposition that if a remedy from deportation is barred as a matter of discretion a court need not consider the statutory aspect.[30] Yet there is the difference that, inter alia, good moral character must be shown for adjustment of status, and for suspension of deportation, but not for asylum: a conviction for a crime is not a statutory bar to a grant of asylum. Further, a number of recent decisions state clearly that a conviction for a "particularly serious crime," or commission of a "serious nonpolitical crime" abroad, is not only not a basis for pretermitting a hearing on asylum, but is only one element to consider regarding the discretionary aspect and not a statutory bar to asylum.[31] As it occurred, in *In re Carballe* the immigration judge found a discretionary bar to asylum, based solely upon the fact of conviction for a "particularly serious crime," and pretermitted a hearing on the statutory aspect of asylum and on any further

23. *Supra* note 6.

24. *In re* Saban, 18 I. & N. Dec. 70 (B.I.A. 1981).

25. 8 C.F.R. § 208.10(b) (1988).

26. *See* Arauz v. Rivkind, 834 F.2d at 979.

27. *See* Immigration and Nationality Act, § 208(a), 8 U.S.C. § 1158(a) (1982); *In re* Salim, 18 I. & N. Dec. 311 (B.I.A. 1982).

28. 429 U.S. 24 (1976).

29. 8 U.S.C. § 1255 (1982 & Supp. 1986), *as amended*.

30. In addition to the *Bagamasbad* decision two other decisions were cited with it in the *Carballe* case, Immigration & Naturalization Serv. v. Rios-Pineda, 471 U.S. 444 (1985) and *In re* Reyes, 18 I. & N. Dec. 249 (B.I.A. 1982). These two decisions concerned motions to reopen for suspension of deportation, under § 244(a) of the Immigration and Nationality Act (8 U.S.C. § 1254(a) (1982)), and contained the same proposition of law as the *Bagamasbad* decision. It may be noted that in a very recent decision, *In re* Gonzalez, I. & N. Dec., Interim Dec. No. 3071 (B.I.A. 1988), the Board of Immigration Appeals receded from its position in *Carballe* on pretermitting hearings on the statutory and discretionary aspects of asylum.

31. *Castro-O'Ryan*, 821 F.2d at 1415; *Shahandeh-Pey*, 831 F.2d at 1384; *Arauz*, 834 F.2d at 979.

evidence regarding the discretionary aspect. The United States Supreme Court, in its recent decision, *Immigration & Naturalization Service v. Abudu*,[32] cites its *Bagamasbad* and *Rios-Pineda* decisions,[33] and seems to support the proposition that the principle expounded in those cases may be applied in asylum cases, but does not suggest that a hearing may be pretermitted on the discretionary aspect of asylum. The *Abudu* and *Rios-Pineda* cases, however, concerned motions to reopen when normally the immigration judge makes a decision on the basis of moving and responding papers and not necessarily by conducting a hearing. Beyond this, the Board of Immigration Appeals, recently in *Matter of Pula*,[34] has set forth a broad standard for considering the discretionary aspect of asylum: "the totality of the circumstances and actions of an alien in his flight from the country where he fears persecution should be examined in determining whether a favorable exercise of discretion is warranted."[35] It would seem extremely awkward then to try to pretermit the introduction and consideration of evidence on the statutory aspect of asylum, except perhaps in motions to reopen. The expectation is that evidentiary hearings will still occur on both the statutory and discretionary aspects of asylum where the bar of section 243(h)(2) exists for withholding of deportation.

32. 108 S. Ct. 904 (1988).
33. *Supra* notes 25 & 27.
34. I. & N. Dec., Interim Dec. No. 3033 (B.I.A. 1987).
35. *Id.*